89-1584

No. _____

In The

Supreme Court of the United States

October Term 1989

DEAN WITTER REYNOLDS INC. and
JEFFREY HINES,

Petitioners,

v.

FLORABELLE COFFEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Does rescinded Securities and Exchange Commission Rule 15c2-2 invalidate an otherwise enforceable arbitration agreement?

RULE 29.1 LIST

A. Parent Companies

Dean Witter Reynolds Inc. is a wholly owned subsidiary of Dean Witter Financial Services Inc., which is a wholly owned subsidiary of Dean Witter Financial Services Group Inc., which is a wholly owned subsidiary of Sears, Roebuck and Co.

B. Subsidiaries (Except Wholly Owned Subsidiaries)

All Dean Witter Reynolds Inc. subsidiaries are wholly owned.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Dean Witter Reynolds Inc. and Jeffrey Hines ("Dean Witter") respectfully request that a writ of certiorari be issued to review a decision of the United States Court of Appeals for the Tenth Circuit, entered on December 5, 1989 and modified on January 11, 1990. Over a strong dissent, the majority opinion reversed the Order of the United States District Court for the District of Colorado confirming an arbitration award in favor of Dean Witter and against Florabelle Coffey ("Coffey"). Pursuant to an arbitration agreement between the parties, the District Court had previously ordered arbitration of Coffey's claim under § 10(b) of the Securities Exchange Act of

1934, 15 U.S.C. § 78j(b) (1982), and Securities and Exchange Commission ("SEC") Rule 10b-5, 17 C.F.R. 240.10b-5 (1989).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 891 F.2d 261 (10th Cir. 1989), and is reproduced in the Appendix at A-3. The orders of the United States District Court for the District of Colorado are not reported and are reproduced in the Appendix at A-19 and A-22.

JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1989. (Appendix A-3.) Upon Dean Witter's Petition for Rehearing, the modifying order of the Court of Appeals was entered on January 11, 1990. (Appendix A-1.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTE AND RULE INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2 (1989), and SEC Rule 15c2-2, 17 C.F.R. § 240.15c2-2 (1987), *rescinded*, 52 Fed. Reg. 39,216 (effective October 21, 1987), are reproduced in the Appendix at A-31.

STATEMENT OF THE CASE

On April 28, 1983, Coffey executed a Customer's Agreement with Dean Witter which provided for the arbitration of any controversy arising out of or relating to any securities account opened by Coffey with Dean Witter. The agreement provided, in part:

> 2. Whenever any rule or regulation shall be proscribed or promulgated by . . . the Federal Securities and Exchange Commission . . . which shall affect in any manner or be inconsistent with any of the provisions hereof, the provisions of this agreement so affected shall be modified or superseded, as the case may be, by such . . . rule or regulation, and all other provisions of the agreement and the provisions as so modified or superseded, shall in all respects continue to be in full force and effect.
>
> * * *
>
> 16. Any controversy between [Dean Witter] and the undersigned arising out of or relating to this contract or the breach thereof, shall be settled by arbitration . . .

On November 18, 1983, the SEC announced its adoption of 17 C.F.R. 240.15c2-2 (1987). Recourse to the Courts Notwithstanding Arbitration Clauses in Broker-Dealer Customer Agreements, Exchange Act Release No. 20,397 [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,452 (Nov. 18, 1983). Rule 15c2-2 required broker-dealers to disclose to public customers that arbitration agreements do not preclude judicial recourse for federal securities law claims.

On September 4, 1984, Coffey and her husband opened a joint securities account with Dean Witter. A

dispute arose, and, on October 15, 1985, Coffey filed her Complaint in the United States District Court for the District of Colorado asserting a Rule 10b-5 claim and five pendent state law claims. The District Court's jurisdiction over Coffey's Rule 10b-5 claim was based on 28 U.S.C. § 1331 (1982). The District Court dismissed the pendent state law claims, and denied Dean Witter's motion to compel arbitration of the Rule 10b-5 claim. (Appendix A-24.) Dean Witter appealed the denial of the motion to compel arbitration to the United States Court of Appeals for the Tenth Circuit.

While that appeal was pending, this Court decided *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987). The Court of Appeals granted Dean Witter's motion to remand the case to the District Court for reconsideration of the motion to compel arbitration of the Rule 10b-5 claim. (Appendix A-23.) On July 7, 1987, relying on *McMahon*, the District Court ordered the claim to arbitration. (Appendix A-22.)

As a result of the *McMahon* decision, the SEC rescinded Rule 15c2-2 effective October 21, 1987. 52 Fed. Reg. 39,216.

On June 8, 1988, following the arbitration of Coffey's claims, an arbitration award issued in favor of Dean Witter. On July 27, 1988, the United States District Court confirmed the award, denied Coffey's motions to vacate, and entered judgment against Coffey. (Appendix A-19.)

On August 24, 1988, Coffey appealed the District Court's decision to the United States Court of Appeals for the Tenth Circuit. On December 5, 1989, the Court of

Appeals reversed the decision of the District Court. (Appendix A-3.) On January 11, 1990, upon Dean Witter's Petition for Rehearing, the Court of Appeals modified its opinion to state that the Court did not address the state law claims which were also arbitrated. (Appendix A-1.)

ARGUMENT FOR GRANTING THE WRIT

The Tenth Circuit decision invokes SEC Rule 15c2-2 to invalidate the otherwise enforceable arbitration agreement between the parties. The decision relies on holdings of the Third and Ninth Circuits, which directly conflict with decisions of the Fourth, Fifth and Eleventh Circuits, as well as with decisions of this Court. The majority opinion ignores the strong Congressional and judicial policy which favors arbitration. The decision permits an investor who signed an arbitration agreement either prior to or during the pendency of Rule 15c2-2 to void the agreement, notwithstanding that the rule was rescinded by the SEC because it was contrary to a decision of this Court.

The majority opinion reflects an outdated judicial mistrust of arbitration. This case presents the Court with the opportunity to resolve significant and recurring questions regarding the effect of the promulgation and rescission of Rule 15c2-2 on the arbitrability of federal securities law claims. These questions, left open in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917 (1989), have divided the federal circuits

and the district courts. The issue is of the utmost importance because it is consuming significant judicial time, as evidenced by at least 32 United States District Court decisions which, since the rescission of Rule 15c2-2, have wrestled with its effect on arbitration agreements.[1] A writ

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[1] *See DiNatale v. Shearson Lehman Hutton, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 94,956 (S.D.N.Y. Feb. 15, 1990); *Berning v. A.G. Edwards & Sons, Inc.*, No. 89 C 6483 (N.D. Ill. Dec. 29, 1989) (LEXIS, Genfed library, Dist file); *Ottenritter v. Shearson Lehman Hutton, Inc.*, 727 F. Supp. 980 (D. Md. 1989); *Scher v. Bear Stearns & Co., Inc.*, 723 F. Supp. 211 (S.D.N.Y. 1989); *Kadow v. A.G. Edwards & Sons, Inc.*, 721 F. Supp. 201 (W.D. Ark. 1989); *Antinoph v. Laverell Reynolds Securities, Inc.*, No. 88-3664 (E.D. Pa. Sept. 5, 1989) (LEXIS, Genfed library, Dist file); *Dale v. Prudential-Bache Securities Inc.*, 719 F. Supp. 1164 (E.D.N.Y. 1989); *Stander v. Financial Clearing & Services Corp.*, 718 F. Supp. 1204 (S.D.N.Y. 1989); *Amodio v. Blinder, Robinson & Co.*, 715 F. Supp. 32 (D. Conn. 1989); *Iacono, M.D., Inc. v. Drexel Burnham Lambert, Inc.*, 715 F. Supp. 18 (D.R.I. 1989); *Shirl v. Drexel Burnham Lambert Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,467 (D. Minn. May 24, 1989); *Wilkerson v. J.C. Bradford & Co.*, [1989 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 94,519 (W.D. Ky. Apr. 6, 1989); *Ingels v. PaineWebber Inc.*, No. 88-2466 (D. Kan. Mar. 20, 1989) (LEXIS, Genfed library, Dist file); *Haver v. B. C. Christopher Securities Co.*, 88-1194-K (D. Kan. Mar. 7, 1989) (LEXIS, Genfed library, Dist file); *Paulson v. Dean Witter Reynolds, Inc.*, 708 F. Supp. 1163 (D. Or. 1989); *Karol v. Bear Stearns & Co., Inc.*, 708 F. Supp. 199 (N.D. Ill. 1989); *Mignocchi v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 707 F. Supp. 140 (S.D.N.Y. 1989); *Wehe v. Montgomery*, 711 F. Supp. 1035 (D. Or. 1989); *Kayne v. PaineWebber Inc.*, 703 F. Supp. 1334 (N.D. Ill. 1989); *Gonick v. Drexel Burnham Lambert, Inc.*, 711 F. Supp. 981 (N.D. Cal. 1988); *Kazan v. Legg Mason Wood Walker, Inc.*, No. 88-4085 (E.D. Pa. Dec. 9, 1988) (LEXIS, Genfed library, Dist file); *Seres v. Drexel Burnham Lambert Inc.*,

(Continued on following page)

should issue to enable this Court to resolve these conflicts and questions.

I. THE DECISION OF THE MAJORITY, WHILE IN AGREEMENT WITH DECISIONS OF THE THIRD AND NINTH CIRCUITS, IS IN CONFLICT WITH DECISIONS OF THE FOURTH, FIFTH AND ELEVENTH CIRCUITS.

The Tenth Circuit opinion recognizes that Dean Witter and Coffey intended that Coffey's claims be arbitrated. (Appendix A-7.) The majority opinion nonetheless invalidates the arbitration agreement by concluding that Coffey had a "reasonable expectation, based on the clear, unequivocal language of the Rule 15c2-2-mandated modification of the arbitration clause, that she could litigate federal securities law claims under the joint account." (Appendix A-12.) In so concluding, the majority rejects the decisions of three other federal circuits.

(Continued from previous page)

No. CV88-0628-PA (D. Or. Oct. 31, 1988) (LEXIS, Genfed library, Dist file); *Church v. Gruntal & Co., Inc.*, 698 F. Supp. 465 (S.D.N.Y. 1988); *Esposito v. Hyer, Bikson & Hinsen, Inc.*, 709 F. Supp. 1020 (D. Kan. 1988); *Reed v. Bear, Stearns & Co.*, 698 F. Supp. 835 (D. Kan. 1988); *Federal Ins. Co. v. Mallardi*, 696 F. Supp. 875 (S.D.N.Y. 1988); *Ahrberg v. Colton*, [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,910 (W.D. Okla. June 21, 1988); *Gugliotta v. Evans & Co., Inc.*, 690 F. Supp. 144 (E.D.N.Y. 1988); *Peoples Fed. Savings & Loan Assn. v. Mortgage Govt. Securities, Inc.*, No. 87-3859 (E.D. La. May 4, 1988) (LEXIS, Genfed library, Dist file); *Ketchum v. Almahurst Bloodstock IV*, 685 F. Supp. 786 (D. Kan. 1988); *McCowan v. Dean Witter Reynolds, Inc.*, 682 F. Supp. 741 (S.D.N.Y. 1987); *DeKuyper v. A.G. Edwards & Sons, Inc.*, 695 F. Supp. 1367 (D. Conn. 1987).

In *Villa Garcia v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 833 F.2d 545, 547 (5th Cir. 1987), the Fifth Circuit recognized that enforcement of agreements to arbitrate does not undermine any substantive rights afforded by the federal securities laws. Accordingly, it applied the rescission of Rule 15c2-2 retroactively under "the usual rule that federal cases should be decided in accordance with the law as it exists at the time of the decision."[2] This Court employed the same rule of review in holding that its decision in *Rodriguez de Quijas v. Shearson/American Express, Inc.* applied retroactively to the facts of that case.[3]

The decisions in *Adrian v. Smith Barney, Harris, Upham & Co., Inc.*, 841 F.2d 1059 (11th Cir. 1988) and *Jeske v. Brooks*, 875 F.2d 71 (4th Cir. 1989) followed *Villa Garcia*. In *Jeske*, the court concluded that application of the usual rule of retroactivity did not disrupt the customer's course of conduct or reasonable expectations because he could not have relied on Rule 15c2-2. Like Coffey, Jeske signed the Customer's Agreement before the rule was enacted. The court found that there was no evidence that the customer would not have signed the agreement if he foresaw that all federal securities law claims would be arbitrable. Moreover, it concluded, as did this Court, that

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[2] Another panel of the Tenth Circuit recognized the application of the general rule to questions concerning the arbitration of federal securities law claims in *Peterson v. Shearson/American Express, Inc.*, 849 F.2d 464 (10th Cir. 1988). That panel held that this Court's decision in *McMahon* should be retroactively applied to require arbitration of the plaintiff's Rule 10b-5 claim.

[3] *Rodriguez de Quijas*, 109 S.Ct. 1917, 1922 (1989).

a party's preference for litigation over arbitration " 'does not rise to the level of a substantive right.' "[4] Likewise, the dissenting Tenth Circuit opinion in this case concludes that "[t]here is nothing in the record to support this court's decision that plaintiff-appellant has a reasonable expectation in the continued application of a now incorrect view of the law." (Appendix A-16.)

The majority opinion in this case relies on the decisions of the Third and Ninth Circuits.[5] (Appendix A-12.) Those decisions upheld a customer's right to litigate rather than arbitrate federal securities law claims. They relied on the language of the arbitration agreements involved in those cases which expressly precluded arbitration of federal securities law claims.[6] In each of those cases, the arbitration provisions were drafted and executed after

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[4] *Jeske*, 875 F.2d at 75.

[5] *Ballay v. Legg Mason Wood Walker, Inc.*, 878 F.2d 729 (3d Cir. 1989); *Gooding v. Shearson Lehman Bros., Inc.*, 878 F.2d 281 (9th Cir. 1989); and *Van Ness Townhouses v. Mar Industries Corp.*, 862 F.2d 754 (9th Cir. 1989).

[6] The arbitration provision at issue in *Ballay* included the following sentence: "However, I am aware that this arbitration is not binding upon me in any dispute or controversy that arises under the federal securities laws, and, in such cases, I may seek resolution through litigation in the courts." 878 F.2d at 731, n.1. In *Gooding*, the arbitration provision included a slightly different exclusionary provision. "This agreement to arbitrate does not apply to any controversy with a public customer for which a remedy may exist pursuant to an express or implied right of action under certain of the federal securities laws." 878 F.2d at 283. The identical sentence was part of the arbitration agreement in *Van Ness Townhouses*, 862 F.2d at 756.

Rule 15c2-2 was enacted and contained language which comports with the Rule.[7]

While the arbitration provision at issue in this case does not contain exclusionary language, the majority opinion finds that "from a private contractual rather than a public regulatory perspective" (Appendix A-10), the arbitration agreement was modified by the rule because the "notice required by Rule 15c2-2 added a new paragraph to the parties' contract." (Appendix A-12.) However, if such analysis is correct, then the agreement was modified again when the rule was rescinded.

While the Fourth, Fifth and Eleventh Circuits give retroactive effect to the rescission of the rule on the ground that no substantive rights are prejudiced, the Third, Ninth and Tenth Circuits conclude that customers have the contractual right to litigate federal securities law claims by virtue of either the language of the arbitration agreement or the rule-mandated modification.

II. THE DECISION OF THE MAJORITY CONFLICTS WITH DECISIONS OF THIS COURT.

Rule 15c2-2, entitled "Disclosure regarding recourse to the courts notwithstanding arbitration clauses in broker-dealer customer agreements," was a disclosure regulation requiring broker-dealers to disclose to their

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[7] *See also Giles v. Blunt, Ellis & Loewi, Inc.*, 845 F.2d 131 (7th Cir. 1988) (where the Seventh Circuit affirmed the lower court's denial of a motion to compel arbitration because the language of the arbitration provision expressly excluded claims based solely on federal securities laws).

public customers that they had a right to litigate federal securities law claims notwithstanding predispute arbitration agreements. The SEC stated that the purpose of the rule was *"to ensure that public customers are not misled concerning such recourse."*[8] The Rule was " 'premised on the Commission's assumption, based on court of appeals decisions following [*Wilko v. Swan*, 346 U.S. 427 (1953)] . . . that agreements to arbitrate Rule 10b-5 claims were not, in fact, enforceable.' "[9] The SEC's assumption, however, was incorrect.

Beginning with *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985), this Court has consistently upheld agreements to arbitrate securities claims. The Court recognized that the "competence of arbitral tribunals" and the "desirability of arbitration" can no longer be questioned.[10]

After the *McMahon* decision, the SEC recognized that Rule 15c2-2 conflicted with the intent of Congress and decisions of this Court. Accordingly, it rescinded the rule. This Court subsequently reversed *Wilko* and upheld the arbitrability of all federal securities law claims.[11] "To the

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[8] Recourse to the Courts Notwithstanding Arbitration Clauses in Broker-Dealer Customer Agreements, Exchange Act Release No. 20,397 [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,452 at 86,356 (Nov. 18, 1983) (emphasis added).

[9] *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 234 n.3 (1987).

[10] *Id.* at 226.

[11] *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917 (1989).

extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."[12]

The decision reflected in the Tenth Circuit majority opinion is in conflict with this Court's decisions upholding arbitration as an acceptable alternative to a judicial forum. The majority's opinion holds that even "if Dean Witter never sent the required notice, its action constituted a violation of Rule 15c2-2 and we will not allow it to profit from its transgression." (Appendix A-13.) As this Court has stated,

> [t]he mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time. . . . Even if *Wilko's* assumptions regarding arbitration were valid at the time *Wilko* was decided, most certainly they do not hold true today for arbitration procedures subject to the SEC's oversight authority.[13]

Moreover, in *Rodriguez de Quijas*, this Court said that " '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' "[14] Thus, under this Court's

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[12] *Id.* at 1920.

[13] *McMahon*, 482 U.S. at 233.

[14] *Rodriguez de Quijas*, 109 S.Ct. at 1920.

decisions, Coffey had a right to the protection of the federal securities laws, but she did not have a statutory right to have her claims determined exclusively in a judicial forum. Accordingly, there is simply no basis for the majority's conclusion that Coffey had a "reasonable expectation" that she could litigate federal securities law claims. (Appendix A-12.)

CONCLUSION

The Tenth Circuit's majority decision resurrects not only Rule 15c2-2, but also a mistrust of arbitration. This Court and Congress have cleared away old doubts about arbitration. The Tenth Circuit's rejection of the jurisprudence established by this Court places a new cloud over the arbitration process. This Court's guidance is essential to resolve the conflict among the Courts of Appeals and to maintain the healthy environment created by this Court's unswerving commitment to enforce arbitration agreements. For these reasons, a writ of certiorari should issue to review the judgment and decision of the Court of Appeals.

Respectfully submitted this 10th day of April, 1990.

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FLORABELLE COFFEY, Plaintiff – Appellant, v. DEAN WITTER REYNOLDS, INC., a Delaware corporation; JEFFREY HINES, an individual, Defendants – Appellees, L. IRVING COFFEY, Third-party-defendant.	)	No. 88-2286

ORDER

Filed January 11, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the court's opinion is modified by adding the following sentence at the end of footnote one: "The arbitration of state law issues is not before us, and we express no opinion on that matter."

The petition for rehearing is denied by the hearing panel. Judge Baldock would grant rehearing.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker,
ROBERT L. HOECKER, Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FLORABELLE COFFEY, Plaintiff-Appellant, v. DEAN WITTER REYNOLDS, INC., a, Delaware corporation, Defendant-Appellee, JEFFREY HINES, an individual, Defendant-Appellee, v. L. IRVING COFFEY, Third-Party-Defendant.	)	No. 88-2286

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 85-M-2256)

Submitted on the briefs:

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William G. Imig and Neal S. Cohen of Ireland, Stapleton, Pryor & Pascoe, Denver, Colorado, for Defendant-Appellee.

Before LOGAN, SEYMOUR, and BALDOCK, Circuit Judges.

LOGAN, Circuit Judge.

Plaintiff Florabelle Coffey brought suit under § 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78j(b), and SEC Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, against defendants Dean Witter Reynolds, Inc. (Dean Witter) and Jeffrey Hines, a Dean Witter account executive.[1] Defendants moved to compel arbitration of the federal claims, but the trial court denied the motion based on *Wilko v. Swan*, 346 U.S. 427 (1953) (agreements to arbitrate federal securities claims void under Securities Act of 1933), *overruled, Rodriguez de Quijas v. Shearson/American Express, Inc.*, 57 U.S.L.W. 4539 (U.S. May 15, 1989); and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823 (10th Cir. 1978) (agreements to arbitrate federal securities claims also void under Exchange Act). Defendants then appealed to this court. We remanded the case to the trial court for reconsideration in light of the Supreme Court's intervening decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), which overruled *Moore* and upheld agreements to arbitrate federal securities claims under the Exchange Act.[2]

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[1] Coffey also brought several pendent state law claims that were dismissed by the trial court.

[2] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

On remand, the district court compelled arbitration of Coffey's 10b-5 claims and subsequently confirmed an arbitral award in favor of both defendants. Coffey appeals from this order and asserts in the alternative that (1) no agreement to arbitrate existed between the parties, and (2) if an arbitration agreement existed, it was modified by operation of SEC Rule 15c2-2, 17 C.F.R. § 240.15c2-2, *rescinded*, 52 Fed. Reg. 39,216 (effective October 21, 1987).

I

Our threshold inquiry is whether the parties agreed to arbitrate the claims at issue. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). An agreement to arbitrate is nothing more than a contract fashioned by the parties in accordance with their intentions. If the parties intended to arbitrate the relevant claims, we must enforce the agreement under the Federal Arbitration Act, 9 U.S.C. §§ 1-14, unless "legal constraints external to the parties' agreement foreclose[] the arbitration of those claims." *Mitsubishi*, 473 U.S. at 628.

In conducting this inquiry, we are mindful that under the Federal Arbitration Act "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (footnote omitted). The Act, however, "does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to

arbitrate from excluding certain claims from the scope of their arbitration agreement." *Volt Information Sciences, Inc. v. Board of Trustees*, 57 U.S.L.W. 4295, 4298 (U.S. March 6, 1989) (citations omitted).

On April 28, 1983, Coffey executed a Customer's Agreement in connection with a Dean Witter commodity account, which provided in relevant part as follows:

> "16. Any controversy between you [Dean Witter] and the undersigned [Coffey] arising out of or relating to this contract or the breach thereof, shall be settled by arbitration. . . .
>
> 17. This agreement . . . and its provisions shall be continuous; shall cover individually and collectively all accounts which the undersigned may open or re-open with you. . . ."

Pl. ex. 3 at 1.

On October 3, 1984, Coffey and her husband executed a Joint Account Agreement With Right of Survivorship ("Joint Account Agreement") in connection with a differently numbered stock account. The Joint Account Agreement did not contain an arbitration clause, and Coffey did not sign a new Customer's Agreement. The Joint Account Agreement is not inconsistent with the Customer's Agreement Coffey had already signed, which treats many aspects not covered by the Joint Account Agreement. Indeed, the Customer's Agreement expressly contemplates that it will apply whether the securities are carried "either individually or jointly with others." *Id.* ¶ 5. And the Joint Account Agreement provides that "[i]f the undersigned [Coffey and her husband] sign and deliver to you [Dean Witter] a Customer's Agreement . . . , [it is] intended to cover, in addition to the provisions

hereof, the terms on which the joint account is to be carried." Pl. ex. 2. Because Coffey already had signed a Customer's Agreement that covered "all accounts" she might thereafter open, no new agreement was necessary to bind her.[3] Thus, because we have no evidence to the contrary, we hold that Coffey and Dean Witter intended the arbitration clause in the Customer's Agreement to apply to claims by Coffey arising under the joint account.

II

Coffey next argues that even if the arbitration clause in her Customer's Agreement applies to claims under the joint account, SEC Rule 15c2-2 modified the agreement to arbitrate. Paragraph 2 of the Customer's Agreement provides that "whenever any rule or regulation shall be prescribed or promulgated by . . . the Federal Securities and Exchange Commission, . . . which shall affect in any manner or be inconsistent with any of the provisions hereof, the provisions of this agreement so affected shall be deemed modified or superseded."

Rule 15c2-2 provided as follows:

> "(a) It shall be a fraudulent, manipulative or deceptive act or practice for a broker or dealer to enter into an agreement with any public customer which purports to bind the customer to the arbitration of future disputes between them

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[3] Nothing in the record indicates whether Coffey's husband, who was joined by Dean Witter and Hines as a third party defendant, signed a Customer's Agreement as well. Defendant's Third Party Complaint against Coffey's husband was dismissed with the rest of the action in the district court's final order of July 27, 1988.-I R. tab 17.

arising under the Federal securities laws, or to have in effect such an agreement, pursuant to which it effects transactions with or for a customer.

(b) Notwithstanding paragraph (a) of this section, until December 31, 1984 a broker or dealer may use existing supplies of customer agreement forms if all such agreements entered into with public customers after December 28, 1983 are accompanied by the separate written disclosure:

> Although you have signed a customer agreement form with FIRM NAME that states that you are required to arbitrate any future dispute or controversy that may arise between us, you are not required to arbitrate any dispute or controversy that arises under the Federal securities laws but instead can resolve any such dispute or controversy through litigation in the courts.

(c) A broker or dealer shall not be in violation of paragraph (a) of this section with respect to any agreement entered into with a public customer prior to December 28, 1983 if:

(1) Any such public customer for whom the broker or dealer has after July 1, 1983 (i) carried a free credit balance, or (ii) held securities for safekeeping or as collateral, or (iii) effected a securities transaction is sent, no later than December 31, 1984, the disclosure prescribed in paragraph (b) of this section; or

(2) Any other public customer is sent upon the completion of his next transaction pursuant to such agreement, the disclosure prescribed in paragraph (b) of this section."

Under this rule, Dean Witter was required to send a written disclosure to Coffey informing her of the right to

a judicial forum for adjudication of any federal securities claims in spite of the arbitration clause in the Customer's Agreement. The question, then, is whether this written disclosure, although based on a view of the law that no longer prevails, precludes arbitration of Coffey's Exchange Act claims over her objection. Relevant to our decision is that Rule 15c2-2 was rescinded after the instant suit was filed but before the district court's decision on remand.

We recognize that some circuits have applied the rescission of Rule 15c2-2 retroactively, paying little or no attention to the contractual modifications and resultant changed expectations effected during the life of the Rule. *See Jeske v. Brooks*, 875 F.2d 71 (4th Cir. 1989); *Adrian v. Smith Barney, Harris, Upham & Co.*, 841 F.2d 1059 (11th Cir. 1988); *Villa Garcia v. Merrill Lynch, Pierce, Fenner and Smith Inc.*, 833 F.2d 545 (5th Cir. 1987). The strongest argument in support of these decisions appears to be "the usual rule that 'federal cases should be decided in accordance with the law existing at the time of the decision,' " *Jeske*, 875 F.2d at 75 (quoting *Saint Francis College v. Al-Kharzraji*, 481 U.S. 604, 608 (1987)), unless "injustice" would result thereby, *id.; see also Villa Garcia*, 833 F.2d at 548 ("manifest injustice" would justify an exception to the "usual rule of retroactivity"). In *Jeske*, the court concluded that no injustice would result from retroactive application of the rule's rescission because (1) the plaintiff signed the customer agreement at issue before the SEC's adoption of the rule, and so could not have relied on the rule in signing the agreement; and (2) the court found no evidence to

indicate that the plaintiff "would not have signed the agreement if he had foreseen that his securities claims would be arbitrable." *Id.*

Both of the *Jeske* court's observations are equally applicable to the Customer Agreement that Coffey signed in October 1983, the arbitration provision of which applies to the Joint Account Agreement under which Coffey now sues. But that arbitration provision did not comply with Rule 15c2-2, and Dean Witter was therefore required to notify Coffey of her right to litigate federal securities law claims. Because the rule required explicit modification of the parties' contract, narrow focus on Coffey's expectations at the time the Customer's Agreement or the Joint Account Agreement was signed is insufficient.

We are more persuaded by the reasoning of those courts which have treated the effect of Rule 15c2-2's requirements, and of the rule's rescission, from a private contractual rather than a public regulatory perspective. *See Ballay v. Legg Mason Wood Walker, Inc.*, 878 F.2d 729 (3d Cir. 1989); *Gooding v. Shearson Lehman Bros., Inc.*, 878 F.2d 281 (9th Cir. 1989). In *Ballay*, plaintiffs signed customer agreements with Legg Mason that contained a broad arbitration provision and the qualification that "this arbitration provision is not binding upon me in any dispute or controversy that arises under the federal securities laws, and, in such cases, I may seek resolution through litigation in the courts." *Id.* at 731 n.1.

Legg Mason argued that this clause "did not reflect a bargained-for term of the contract but rather was included merely to comply with SEC [Rule 15c2-2]." *Id.* at 734. In response, the court concluded that

> "the unequivocal exclusionary language in plaintiffs' arbitration agreements creates a contractual right to litigate plaintiffs' [federal securities law] claims. The language admits of no justification for looking beyond it to the regulatory history surrounding its inclusion. In any event, even if we were to look at the regulatory background we see no reason in it for rejecting customers' reasonable expectations. A customer reading the exclusionary language could not be expected to be aware of the regulatory background or to understand that the language may become meaningless with the winds of change in the law. Legg Mason, if it truly did not intend to be bound by the contractual language it drafted, should have challenged Rule 15c2-2 or reexecuted the arbitration agreements in accordance with its intent after rescission of the Rule."

Id.

In *Gooding*, the arbitration provision at issue was limited by a clause excluding arbitration of "any controversy . . . for which a remedy may exist pursuant to an express or implied right of action under certain of the federal securities laws." 878 F.2d at 283. The broker urged that since this language "was placed in the . . . agreement to satisfy Rule 15c2-2, it should not be enforced because the rule has been rescinded." *Id.* Relying on its earlier decision in *Van Ness Townhouses v. Mar Industries Corp.*, 862 F.2d 754, 758 (9th Cir. 1989), which found that "such an express exclusion from arbitration is an express grant of the right to litigate those claims," the court rejected the broker's argument. "Under the contract, [the broker] agreed that [the customer] had the option of seeking a judicial determination of his federal securities law

claims . . . ," *id.* at 284, and "[b]oth parties must abide by the terms of the contract," *id.*

We find the reasoning of *Ballay* and *Gooding* persuasive and applicable to the case at bar. Although the record does not disclose whether Dean Witter actually sent the required notice to Coffey, that uncertainty does not affect our disposition of the case. If the notice was sent, it became part of the parties' contract, creating a new (albeit unbargained-for) contractual right to litigate federal securities law claims. *See also Wehe v. Montgomery,* 711 F. Supp. 1035 (D. Or. 1989) (notice sent to customer in compliance with Rule 15c2-2 modified unconditional arbitration clause; thus, customer's Exchange Act claims not subject to arbitration even after rule's rescission).

In this situation, like the *Ballay* court, we see no reason to defeat Coffey's reasonable expectation, based on the clear, unequivocal language of the Rule 15c2-2-mandated modification of the arbitration clause, that she could litigate federal securities law claims under the joint account. At the time Coffey commenced the instant litigation Rule 15c2-2 was in effect. The notice required by Rule 15c2-2 added a new paragraph to the parties' contract. This substitute paragraph does not declare that it is effective only until such claims are held to be arbitrable. The substitute language does not automatically become ineffective when the Supreme Court changes its view of the law on securities arbitrations nor, we believe, upon repeal of the rule which dictated the substitute language,

absent a new agreement between Dean Witter and Coffey.[4]

If Dean Witter never sent the required notice, its action constituted a violation of Rule 15c2-2 and we will not allow it to profit from its transgression. *See Paulson v. Dean Witter Reynolds, Inc.*, 708 F. Supp. 1163, 1167 (D. Or. 1989) ("[A]ny provision executed while Rule 15c2-2 was in effect and which purports to bind a customer to arbitration of federal securities claims is unenforceable."); *Wehe v. Montgomery*, 711 F. Supp. 1035, 1039 (D. Or. 1989) (same); *Gugliotta v. Evans & Co.*, 690 F. Supp. 144, 147-49 (E.D.N.Y. 1988) (arbitration clause which violated Rule 15c2-2 when rule was in effect would not be enforced after rule's rescission; "[o]n the contrary, 'an agreement that is illegal by statute or on the grounds of public policy when made is not rendered legal by repeal of the statute or change in the public or legislative policy.' *Palmisano v. United States Brewing Co.*, 131 F.2d 272, 273 (10th Cir. 1942)"). We reject those cases which, by retroactive application of Rule 15c2-2's rescission, have immunized brokers from responsibility for possible violations of the rule while it was in effect. *See, e.g., Adrian*, 841 F.2d at 1061-62 (court did not consider plaintiffs' argument that arbitration clause violated Rule 15c2-2 because "whatever

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[4] Certainly an arbitration provision could have been drafted that would have complied with Rule 15c2-2 and that would have mandated arbitration of federal securities law claims in the event they were held to be arbitrable. *See, e.g., Reed v. Bear, Stearns & Co.*, 698 F. Supp. 835, 840-41 & n.2 (D. Kan. 1988) (court construed language in arbitration clause, "likely included so that the clause would comply with Rule 15c2-2," to mean that "federal securities law claims must be submitted to arbitration when such arbitration is permitted by federal law.")

effect Rule 15c2-2 may have had before its rescission, it can no longer be used as a defense to arbitration"); *Villa Garcia*, 833 F.2d at 548 ("[S]ince the rescission of the Rule should be applied retroactively, we have no occasion to consider whether Merrill Lynch did or did not violate the Rule as Villa contends.").[5]

The approach which we adopt today does not ignore violation of valid regulations, and protects customers' reasonable expectations based on explicit contractual provisions.

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[5] In *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 288 (9th Cir. 1988), a panel of the Ninth Circuit summarily concluded that, because Rule 15c2-2 had been rescinded, the argument that an arbitration provision was unenforceable because it violated the rule while the rule was in effect was "without foundation." If *Cohen* was intended as a holding contrary to our contract approach it has not been followed in the Ninth Circuit. In *Van Ness Townhouses v. Mar Industries Corp.*, 862 F.2d 754 (9th Cir. 1989), a different panel found that "[i]t cannot be doubted that Rule 15c2-2 was intended to prohibit predispute agreements to arbitrate securities claims . . . ," *id.* at 757, and that exclusionary clauses included to comply with the rule constitute "an express grant of the right to litigate those claims," *id.* at 758. Although *Van Ness* did not specifically address arbitration agreements which violated Rule 15c2-2, two district courts in the Ninth Circuit have relied on the case to determine that, despite *Cohen*, "any provision executed while Rule 15c2-2 was in effect and which purports to bind a customer to arbitration of federal securities claims is unenforceable." *Paulson v. Dean Witter Reynolds, Inc.*, 708 F. Supp. 1163, 1167 (D. Or. 1989) (Frye, J.). *Accord Wehe v. Montgomery*, 711 F. Supp. 1035, 1039 (D. Or. 1989) (Redden, J.). *Van Ness*, *Paulson* and *Wehe*, as well as *Gooding*, discussed *ante* at 9, are all in accord with the approach we adopt today.

Thus, we REVERSE the district court's order confirming the arbitral award and dismissing the case and REMAND for further proceedings not inconsistent with this decision.

No. 88-2286, Florabelle Coffey v. Dean Witter Reynolds, Inc., et al.

BALDOCK, Circuit Judge, concurring in part and dissenting in part.

I concur with the court's decision that the parties agreed to arbitrate the claims at issue, but I differ with the court concerning whether plaintiff-appellant may avoid that agreement based upon Rule 15c2-2, 17 C.F.R. § 240.15c2-2 (1987).

First, Rule 15c2-2 was a disclosure provision designed to inform customers that under the then-current law, federal securities claims could be litigated despite a predispute agreement to arbitrate. Recourse to the Courts Notwithstanding Arbitration Clauses in Broker-Dealer Customer Agreements, Exchange Act Release No. 20,397, Nov. 18, 1983, 48 Fed. Reg. 53,404 (1983). As explained by the SEC:

> The Commission is adopting a rule that prohibits broker-dealers from using predispute arbitration clauses in customer agreements that purport to bind public customers to the arbitration of claims arising under the federal securities laws. The rule also requires broker-dealers to disclose to existing public customers that they are not precluded by such clauses from judicial recourse with respect to those claims. The purpose of this rule is to ensure that public customers are not misled concerning such recourse.

Id. The rationale for the rule was that "[t]he federal securities laws . . . provide that broker-dealer agreements purporting to bind public customers to the arbitration of disputes arising in the future are void and unenforceable as applied to those laws." *Id.* (citing *Wilko v. Swan*, 346 U.S. 427 (1953)). Thus, Rule 15c2-2 did not purport to create a new substantive right barring waiver of the right to litigate federal securities law claims. *See Finkle & Ross v. A.G. Becker Paribas, Inc.*, 622 F. Supp. 1505, 1510 (S.D.N.Y. 1985). Instead, it merely required disclosure of the then-current state of the law to public customers. That exposition of the law concerning the 1934 Act was rejected in *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987), and the SEC promptly rescinded its rule, believing that "Rule 15c2-2 is no longer appropriate or accurate and, accordingly, should be rescinded." Recission of Rule Governing Use of Predispute Arbitration Clauses in Broker-Dealer Customer Agreements, Exchange Act Release No. 25,034, Oct. 15, 1987, 52 Fed. Reg. 39,216-17 (1987). The Supreme Court subsequently extended *McMahon* to the 1933 Act and overruled *Wilko v. Swan*. *Rodriguez de Quijas v. Shearson/American Express*, 109 S. Ct. 1917, 1920-21 (1989). There is nothing in the record to support this court's decision that plaintiff-appellant has a reasonable expectation in the continued application of a now incorrect view of the law.

Second, to the extent the arbitration provision in the Customer's Agreement was modified to comply with Rule 15c2-2, the modified provision was again modified when the SEC rescinded the rule. Reliance upon the court's private contractual approach to the arbitration

provision would yield the same result. Paragraph 2 of the Customer's Agreement provides in pertinent part:

> Whenever any statute shall be enacted which shall effect in any manner or be inconsistent with any of the provisions hereof, or whenever any rule or regulation shall be proscribed or promulgated by . . . the Federal Securities and Exchange Commission . . . which shall effect in any manner or be inconsistent with any of the provisions hereof, the provisions of this agreement so affected shall be modified or superseded, as the case may be, by such statute, rule or regulation, and all other provisions of the agreement and the provisions as so modified or superseded, shall in all respects continue to be in full force and effect.

Rec. vol. I, doc. 15, ex. 3. This paragraph resulted in the incorporation of Rule 15c2-2 into the contract on the effective date of the rule, December 28, 1983. *See* Rel. No. 20,397, 48 Fed. Reg. 53,407. On October 21, 1987, the SEC's final rule rescinding Rule 15c2-2 became effective. Rel. No. 25,034, 52 Fed. Reg. 39,216. This final rule, promulgated by the SEC, clearly affected the arbitration provision of the contract as previously amended by the required language of Rule 15c2-2. Once again the arbitration provision was modified, but this time back to its original state and all claims were subject to arbitration.

Given the strong federal policy in favor of arbitration and the highly regulated nature of securities markets, the rescission of Rule 15c2-2 should be applied to the contract and the district court's order confirming the arbitral award should be confirmed. *See Jeske v. Brooks*, 875 F.2d 71, 74-75 (4th. Cir. 1989); *Adrian v. Smith Barney, Harris, Upham & Co.*, 841 F.2d 1059, 1061-62 (11th Cir. 1988);

Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 288 (9th Cir. 1988); *Villa Garcia v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 833 F.2d 545, 547-48 (5th Cir. 1987); *contra Ballay v. Legg Mason Wood Walker, Inc.*, 878 F.2d 729, 733-34 (3d Cir. 1989); *Gooding v. Shearson Lehman Bros.*, 878 F.2d 281, 284 (9th Cir. 1989); *Van Ness Townhouses v. Mar Industries Corp.*, 862 F.2d 754, 758 (9th Cir. 1989); *Leicht v. Bateman, Eichler, Hill, Richards, Inc.*, 848 F.2d 130, 133-34 (9th Cir. 1988). I respectfully dissent from that part of this court's opinion which holds otherwise.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 85-M-2256

FLORABELLE COFFEY,

Plaintiff,

v.

DEAN WITTER REYNOLDS, INC. and
JEFFREY HINES,

Defendants.

ORDER CONFIRMING ARBITRATION AWARD
AND DISMISSING ACTION

On June 30, 1988, the plaintiff filed a motion to vacate arbitration award, seeking an order of this court to vacate the award of the American Arbitration Association Panel of Arbitrators, dated June 8, 1988, attached as Exhibit A to that motion. On July 20, 1988, the defendants filed an application for confirmation of that arbitration award and for dismissal of this civil action, including the third party complaint. The plaintiff's motion to vacate is an attempt to re-litigate this court's order of July 7, 1987, which granted the defendants' motion to compel arbitration of the federal claim in this case. The state law claims in this case were previously dismissed by order of July 16, 1986. It appearing to the court that the only issues which would be within the jurisdiction of this court have been resolved by the arbitration proceedings, it is now

ORDERED that the arbitration award of June 8, 1988, is confirmed and it is

FURTHER ORDERED that the third party complaint is dismissed and this civil action is dismissed.

Dated: July 27, 1988

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch, Judge

ENTERED
ON THE DOCKET
JUL 27 1983
BY JAMES R. MANSPEAKER
CLERK

FILED
JUL 27 1988

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

FLORABELLE COFFEY,

Plaintiff,

v.

DEAN WITTER REYNOLDS, INC. and JEFFREY HINES,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 85-M-2256

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or

heard and a decision has been rendered. Pursuant to order confirming arbitration award and dismissing action, entered by Judge Richard P. Matsch on July 27, 1988,

IT IS ORDERED AND ADJUDGED that the arbitration award of June 8, 1988, is confirmed and it is

FURTHER ORDERED that the third party complaint is dismissed and this civil action is dismissed.

ENTERED
ON THE DOCKET
JUL 27 1983
BY JAMES R. MANSPEAKER
CLERK

July 27, 1988
Date

JAMES R. MANSPEAKER
Clerk

/s/ Norma Hatcher
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED
JUL – 7 1987

CIVIL ACTION NO. 85-K-2256

FLORABELLE COFFEY,

Plaintiff,

vs.

DEAN WITTER REYNOLDS, INC., et al.,

Defendants.

ORDER

IT IS ORDERED that the motion to arbitrate is granted.

DATED at Denver, Colorado this 7th day of July, 1987.

/s/ John L. Kane Jr.
UNITED STATES
DISTRICT JUDGE

MAY TERM – June 26, 1987

Before Honorable John P. Moore and Honorable Bobby R. Baldock, Circuit Judges

FLORABELLE COFFEY,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	
	)	
DEAN WITTER REYNOLDS, INC., a Delaware corporation, and JEFFREY HINES, an individual,	)	No. 86-2074
	)	
	)	(D.C. No.
Defendants-Appellants.	)	85-K-2256)
	)	

Appellants' unopposed motion for immediate remand for consideration of arbitrability is granted. The appeal is dismissed.

ROBERT L. HOECKER
Clerk

By:/s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 85-K-2256

FLORABELLE COFFEY,

Plaintiff,

vs.

DEAN WITTER REYNOLDS, INC., et al.,

MEMORANDUM OPINION AND ORDER

Kane, J.

On April 28, 1983, plaintiff Florabelle Coffey opened a commodities futures account, # 47697-4, with defendants Dean Witter Reynolds, Inc. and Jeffrey Hines. On September 4, 1984, plaintiff opened a stock trading account, # 053343, with defendants. She now brings suit against defendants alleging (1) violation of Section 10b of the Securities Exchange Act of 1934 [15 U.S.C. § 78(j)] and Rule 10b-5 [17 C.F.R. § 240.10b-5]; (2) breach of fiduciary duties; (3) negligence; (4) violation of the Colorado Securities Act, 1973 C.R.S. §§ 11-51-123 and 11-51-125(2); (5) intentional infliction of emotional distress; and (6) negligent supervision. She asserts defendants' alleged conduct was attended by circumstances of fraud, malice or insult, intentional misconduct, or a wanton and reckless disregard of her rights and feelings so as to merit an award of punitive damages. These claims are all brought with respect to the stock trading account only.

In regard to the federal securities claim, jurisdiction lies under 15 U.S.C. § 78(a) and 28 U.S.C. § 1331. Jurisdiction over the remaining state or statutory common law claims is invoked pursuant to the doctrine of pendent jurisdiction.[1] Venue is proper under 28 U.S.C. § 1391(b).

This matter is now before me on defendants' motion to dismiss plaintiffs' [sic] state claims pursuant to Fed.R.Civ.P. 12(b)(1) and for an order compelling arbitration and staying disposition of the federal securities claim pursuant to 9 U.S.C. §§ 3 and 4, (The Arbitration Act). For the reasons set forth below, I deny arbitration and dismiss plaintiff's state law claims.

Motion to Compel Arbitration / Stay

The commodities futures account contains, *inter alia*, the following provisions:

> 16. Any controversy between [Dean Witter] and the undersigned arising out of or relating to this Contract or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of either the Arbitration Committee of the Chamber of Commerce of the State of New York, or the American Arbitration Association, or the Board of Arbitration of the New York Stock Exchange, as the undersigned may elect . . .
>
> 17. This agreement and its enforcement shall be governed by the laws of the State of New York and its provisions shall be continuous; shall cover individually and collectively all accounts which the undersigned may open or reopen with [Dean Witter] . . .

The stock account is void of reference to arbitration.

Defendants contend that the commodities account arbitration clause is a valid agreement to arbitrate disputes arising under the stock account. Defendants argue that, considered with federal statutues and policy favoring arbitration, the arbitration clause requires me to compel arbitration and stay this suit.

Federal policy favoring arbitration is reflected in the federal Arbitration Act, 9 U.S.C. §§ 1-14, which provides in § 2 that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon which grounds as exist at law or in equity for the revocation of any contract". Section 3 of the Act provides that in the absence of default by a party seeking arbitration, the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement". Section 4 of the Act provides that if a party refuses to arbitrate in contravention of a written agreement, the court "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement".

Notwithstanding the seemingly mandatory language of the Arbitration Act, judicial exceptions have been carved out of its applicability to claims brought under the federal securities laws. In *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182. 98 L.Ed. 168 (1953), the United States Supreme Court held that a pre-dispute agreement to arbitrate claims arising under the Securities Act of 1933, 15 U.S.C. § 771(2) is unenforceable. Section 22 of the '33 Act, 15 U.S.C. § 77(v), affords the federal securities plaintiff resolution of his claim by a federal judicial forum, with a broad choice of venue and concomittant [sic] nationwide service. Section 14(6) of the '33 Act, 15 U.S.C. § 77n holds

that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of rules and regulations of the commission shall be void". The *Wilko* court considered the arbitration agreement to be a "stipulation" which was "void" as it attempted to "waive" compliance with the "provision" affording the federal securities plaintiff access to the federal courts.

The rationale behind the *Wilko* courts' subordination of the Arbitration Act to the Securities Act of 1933 was that the latter was extraordinary legislation protecting disadvantaged securities purchasers which could be entirely circumvented if arbitration clauses would be given effect.

Employing the notion that the securities laws protect a purchaser in a market historically rife with abuses, courts since *Wilko* have expanded the *Wilko* doctrine to actions, such as the present one, under the Securities Exchange Act of 1934. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823 (10th Cir. 1978), the 10th Circuit Court of Appeals held that arbitration agreements in cases involving § 10 and Rule 10b-5 of the 34 Act are void as they seek to waive the jurisdictional provisions of that Act.

Defendants rely on Justice White's solo concurrence in *Dean Witter Reynolds, Inc. v. Byrd*, ___ U.S. ___, 105 S.Ct. 1238, 1244, 84 L.Ed2d 158 (1985), to assert that the continued viability of the 10th Circuit's extension of *Wilko* to '34 Act claims in *Moore* is "a matter of substantial doubt".[2] Justice White's dicta is not law. The unanimous majority specifically declined to address the arbitrability of '34 Act

claims. Until the majority of the Court decides this issue I am bound by the decision in *Moore*.

Accordingly, the portion of defendants' motion seeking an order compelling arbitration of the plaintiff's federal claims arising under the '34 Act is hereby denied.[3]

Motion to Dismiss Pendent Claims

Defendants contend that this court should deny its discretionary exercise of pendent jurisdiction over plaintiff's state law claims as there is no independent federal jurisdiction.

The doctrine of pendent jurisdiction permits a district court to decide all questions that the case presents. The Supreme Court in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966) ruled that the power to entertain pendent claims exists when the state and federal claims "derive from a common nucleus of operative fact". *See, Hackbart v. Cincinnati Bengals*, 601 F.2d 516 (10th Cir. 1979) *cert. denied* 444 U.S. 931, 100 S.Ct. 275, 62 L.Ed.2d 188. The doctrine is discretionary and not a matter of right. *Gibbs*, 383 U.S. at 726.

For the reasons detailed by Judge Matsch in *Kerby v. Commodity Resources, Inc*, 395 F.Supp. 786 (D. Colo 1975), I decline pendent jurisdiction of all state law claims. Assertion of such claims in the context of this suit only serves to expand improperly the coverage and remedies provided under federal securities laws. Moreover, submission of similar but distinct state and federal securities statutes will tend to confuse a jury. The convenience of

plaintiff, *see Noland V. Gurley*, 566 F.Supp 210, 219 (D.Colo. 1983), is insufficient to militate in favor of pendent jurisdiction. Accordingly, defendants' motion to dismiss plaintiff's state law claims, Counts 2 through 6, is granted.

It is hereby ORDERED that defendants' motion to

1) compel arbitration and stay this suit is denied; and

2) dismiss plaintiff's pendent claims is granted.

It is FURTHER ORDERED that the parties shall complete discovery by October 15, 1986 and shall submit a stipulated pre-trial order by November 15, 1986.

DATED at Denver, Colorado, this 16th day of July, 1986.

/s/ John L. Kane Jr.
UNITED STATES
DISTRICT JUDGE

---

1. While plaintiff's complaint also asserts the parties' diversity of citizenship as grounds for jurisdiction under 28 U.S.C. § 1332, she fails to allege her own citizenship or that of defendant Hines. She has not therefore, set forth "a short and plain statement of the grounds upon which the court's jurisdiction depends" as required by Fed.R.Civ.P. 8(a)(1). Defendants specifically raise this point in their brief supporting the instant motion. They claim that plaintiff and defendant Hines are, in fact, both citizens of Colorado. This assertion is inferentially supported by the complaint which states that plaintiff is a Colorado resident and that Defendant Hines is an employee of Dean Witter in its downtown Denver office. Further, in her defense to this motion plaintiff appears to have abandoned diversity as a jurisdictional basis of her state claims, arguing only for discretionary pendent jurisdiction.

2. Plaintiffs contend that the arbitration clause of the commodities account is not applicable to the stock account, notwithstanding language to the opposite effect in the commodities account agreement. Because I hold that the federal securities claim is not arbitrable, in any event, I need not address this issue.

3. In *Dean Witter Reynolds, Inc. v. Byrd,* ___ U.S. ___, 105 S.Ct. 1238, 84 L.Ed 2d 158 (1985) the Supreme Court rejected the "doctrine of intertwining". Before *Byrd* some jurisdictions held that when arbitrable and non-arbitrable claims arise out of the same transaction and are sufficiently intertwined factually and legally the district court in its discretion may deny arbitration of the otherwise arbitrable pendent state claims and try all the claims together in federal court. Because I decline to exercise pendent jurisdiction of the state claims, the *Byrd* court's guidance as to the arbitrability of such claims is of no present import.

4. Plaintiff's argue that ¶ 2 of the Customer's Agreement, Security Exchange Act Release no. 15 984, July 2, 1979 and S.E.C. Rule 15c2-2 operate so as to preclude enforceability of the arbitration clause. I need not address this argument, as I find compelling arbitration of the 10b-5 claim prohibited by the *Moore* extension of the *Wilko* doctrine.

Federal Arbitration Act, United States Code, Title 9 (1988).

> § 2. Validity, irrevocability, and enforcement of agreements to arbitrate.
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Code of Federal Regulations, Title 17 (1987).

> § 240.15c2-2. Disclosure regarding recourse to the courts notwithstanding arbitration clauses in broker-dealer customer agreements.
>
> (a) It shall be a fraudulent, manipulative or deceptive act or practice for a broker or dealer to enter into an agreement with any public customer which purports to bind the customer to the arbitration of future disputes between them arising under the federal securities laws, or to have in effect such an agreement, pursuant to which it effects transactions with or for a customer.
>
> (b) Notwithstanding paragraph (a) of this section, until December 31, 1984 a broker or dealer may use existing supplies of a customer agreement forms if all such agreements entered into

with public customers after December 28, 1983 are accompanied by the separate written disclosure:

> Although you have signed a customer agreement form with FIRM NAME that states that you are required to arbitrate any future dispute or controversy that may arise between us, you are not required to arbitrate any dispute or controversy that arises under the federal securities laws but instead can resolve any such dispute or controversy through litigation in the courts.

(c) A broker or dealer shall not be in violation of paragraph (a) of this section with respect to any agreement entered into with a public customer prior to December 28, 1983 if:

(1) Any such public customer for whom the broker or dealer has after July 1, 1983 (i) carried a free credit balance, or (ii) held securities for safekeeping or as collateral, or (iii) effected a securities transaction is sent, no later than December 31, 1984, the disclosure prescribed in paragraph (b) of this section; or

(2) Any other public customer is sent upon the completion of his next transaction pursuant to such agreement, the disclosure prescribed in paragraph (b) of this section.

No. 89-1584

In The

Supreme Court of the United States

October Term 1989

DEAN WITTER REYNOLDS INC. and
JEFFREY HINES,

Petitioners,

v.

FLORABELLE COFFEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. 89-1584

In The

Supreme Court of the United States

October Term 1989

DEAN WITTER REYNOLDS INC. and
JEFFREY HINES,

Petitioners,

v.

FLORABELLE COFFEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent Florabelle Coffey respectfully requests that the Petition for Writ of Certiorari to review a decision of the United States Court of Appeals for the Tenth Circuit, entered on December 5, 1989 and modified on January 11, 1990, be denied.

OPINIONS BELOW

The Respondent concurs with the Petitioners' statement of the Opinions Below.

JURISDICTION

The Respondent concurs with the Petitioners' statement of Jurisdiction.

STATUTE AND RULE INVOLVED

The Respondent concurs with the Petitioners' statement of the Statue and Rule Involved.

STATEMENT OF THE CASE

The Respondent concurs with the Petitioners' Statement of the Case.

ARGUMENT FOR DENYING THE WRIT

The Tenth Circuit decision reversing the Trial Court's Order Compelling Arbitration between the parties is in accordance with this Court's decisions in *Shearson/American Express Inc. vs. McMahon,* 482 U.S. 220 (1987) and *Rodriguez de Quijas vs. Shearson/American Express, Inc.,* 109 S.Ct. 1917 (1989). In those cases, while finding that Federal Securities claims under the Securities Exchange Act of 1934 ("Exchange Act") are subject to arbitration, such arbitration is only to be compelled where there is a contract requiring the same between the parties. The Tenth Circuit majority opinion correctly held that SEC Rule 15c2-2 as promulgated by the Securities and Exchange Commission became part of the contract between the

parties and abrogated any other requirement in the agreement to arbitrate a claim arising under the contract, which claim arose during the period of time that the Rule was in effect.

Respondent concedes that there is a conflict in the Circuits as to the effect of the recision of SEC Rule 15c2-2 and its effect on arbitration agreements. Nevertheless, the number of presently pending cases in which this issue would be involved, and the likelihood of any such cases arising in the future, is minimal. The SEC rescinded Rule 15c2-2 in October 1987. The issue involved in this case would only relate to those customers making claim pursuant to a customer agreement entered into before the SEC announced its adoption of Rule 15c2-2 on November 18, 1983, and before its recision of the Rule on October 21, 1987.

I. THE TENTH CIRCUIT DECISION RECOGNIZED THE FUNDAMENTAL PRINCIPLE THAT IN ORDER TO COMPEL ARBITRATION THERE MUST BE AN ENFORCEABLE AGREEMENT BETWEEN THE PARTIES TO DO SO.

The essential basis of *Shearson/American Express, Inc., v. McMahon*, 482 U.S. 220 (1987), and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917 (1989), and the earlier decision of this Court in *Dean Witter Reynolds v. Byrd*, 105 S.Ct. 38 (1985) is that customer agreements between customers and brokers containing arbitration clauses are contracts that will be enforced absent public policy considerations or statutes to the contrary. Paragraph 2 of the Customer Agreement between the parties provided, in part:

> 2. Whenever any rule or regulation shall be proscribed or promulgated by . . . Federal Securities and Exchange Commission . . . which shall affect in any manner or be inconsistent with any of the provisions hereof, the provisions of this agreement so affected shall be modified or superceded as the case may be, by such . . . rule or regulation, and all other provisions of the agreement and the provisions as so modified or superceded, shall in all respects continue to be in full force and effect.

The Tenth Circuit decision found that from a private contractual perspective, the arbitration agreement between the parties herein was modified by the SEC Rule and, thus, became part of the contract between the parties. SEC Rule 15c2-2, adopted on November 28, 1983, and which was therefore part of the agreement at the time of the wrongdoing alleged by Respondent, provided, in pertinent part:

> (a) It shall be a fraudulent, manipulative or deceptive act or practice for a broker or dealer to enter into an agreement with any public customer which purports to bind the customer to the arbitration of future disputes between them arising under the federal securities laws, or to have in effect such an agreement, pursuant to which it effects transactions with or for a customer.
>
> (b) Notwithstanding paragraph (a) of this section, until December 31, 1984, a broker or dealer may use existing supplies of customer agreement forms if all such agreements entered into with public customers after December 28, 1983, are accompanied by the separate written disclosure: "Although you have signed a customer agreement form with FIRM NAME that states that you are required to arbitrate any future

> dispute or controversy that may arise between us you are not required to arbitrate any dispute or controversy that arises under the federal securities laws, but instead can resolve any such dispute or controversy through litigation in the courts.
>
> (c) A broker or dealer shall not be in violation of paragraph (a) of this section with respect to any agreement entered into with a public customer prior to December 28, 1983, if: (1) any such public customer for whom the broker or dealer has after July 1, 1983 . . . effected a securities transaction is sent, no later then the disclosure prescribed in paragraph (b) of this section . . . "

Regardless of whether Rule 15c2-2 was prudently adopted, and whether or not Rule 15c2-2 was ultimately rescinded because of a later decision of this Court, the Rule was nevertheless in effect at all times pertinent hereto and was thus part of the contract between the parties. The mandate of this Court is that contracts must be enforced as written as the agreement between the parties.

II. THE ISSUE PRESENTED BY THE PETITIONERS WILL AFFECT FEW CASES AND LITIGANTS.

The Respondent concedes that there is a conflict among the circuits as to the effect of the recision of the Rule 15c2-2 upon agreements to arbitrate broker/customer disputes. Nevertheless, even though there is such a conflict, the resolution thereof will not substantially affect many cases yet to be decided or which might be filed in the future.

Since Rule 15c2-2 was rescinded in October, 1987, the statute of limitations has or soon will have run on most claims arising for wrongdoing before rescission of the Rule. Thus, the facts of this case are not likely to recur with sufficient frequency.

Finally, virtually none of the cases cited by Petitioners at footnote 1 of their argument relate to the same or similar facts as involved with herein. In those cases, virtually none of the customer agreements involved contained a clause in the contract between the parties incorporating any rules or regulations (such as Rule 15c2-2) as terms of the contract. The cases cited by Petitioners in which the courts wrestled with the effect of the rescission of Rule 15c2-2 on arbitration agreements for the most part simply involve whether arbitration could or could not be compelled simply because of Rule 15c2-2 itself and not because the Rule became part of the contract between the parties. Since the facts of this case are peculiar and are not likely to recur, a Writ of Certiorari to the Tenth Circuit should not be issued.

CONCLUSION

The Tenth Circuit's decision is simply an enforcement of the contract between the parties. Contrary to the Petitioner's assertion, the Tenth Circuit did not reject the jurisprudence established by this Court but, to the contrary, simply reinforced that jurisprudence. This Court's guidance is not essential to the continued enforceability of arbitration agreements in the arbitration in claims arising under the Securities Exchange Act of 1934. For these

reasons, no Writ of Certiorari should be issued to review the judgment and decision of the Tenth Circuit Court of Appeals, and that decision should be allowed to stand.

Respectfully submitted this 16th day of July, 1990.

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PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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I. A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE OF THE SIGNIFICANT CONFLICT AMONG THE CIRCUITS.[1]

The question presented in the Petition is whether the Tenth Circuit majority opinion gives proper effect to the

[1] "Petition" refers to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed by Dean Witter Reynolds Inc. and Jeffrey Hines ("Dean Witter"). "App." refers to the Appendix to the Petition. "Resp." refers to Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed by Respondent Florabelle Coffey.

rescission of Rule 15c2-2. Respondent "concedes that there is a conflict among the circuits as to the effect of the recision [sic] of the Rule 15c2-2 upon agreements to arbitrate broker/customer disputes." (Resp., p. 5.) Accordingly, the parties are in agreement that the circuits are divided over the precise issue before this Court.

That conflict has been heightened by the recent decision of the Ninth Circuit, *Paulson v. Dean Witter Reynolds, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶95,296 (9th Cir., June 5, 1990), issued nearly two months after Dean Witter filed its Petition. The impact of the *Paulson* decision on the question presented by Dean Witter is significant. *Paulson* presents operative facts which are essentially identical to those of this case, yet the court reaches the opposite conclusion:

> The rescission of SEC Rule 15c2-2 has been given a retroactive effect by other courts in claims arising under the Securities Exchange Act of 1934 [*citing Jeske v. Brooks*, 875 F.2d 71 (4th Cir. 1989); *Adrian v. Smith Barney, Harris Upham & Co., Inc.*, 841 F.2d 1059 (11th Cir. 1988); and *Villa Garcia v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 833 F.2d 545 (5th Cir. 1987)]. *But see Coffey v. Dean Witter Reynolds, Inc.*, 891 F.2d 261, 265 (10th Cir. 1989) . . . ; *Ballay v. Legg Mason Wood Walker, Inc.*, 878 F.2d 729 (3d Cir. 1989). . . . We find the cases applying the rescission of SEC Rule 15c2-2 retroactively to be persuasive and consistent with the Supreme Court's decision in *Rodriquez de Quijas*.

Paulson, [Current] Fed. Sec. L. Rep. (CCH) ¶95,296 at 96,372. *Paulson* underscores the conflict among the federal circuits concerning the effect of the rescission of Rule

15c2-2. A writ of certiorari should issue to resolve this conflict.

II. UNLESS THIS COURT RESOLVES THE CONFLICT AMONG THE CIRCUITS, DOZENS OF FEDERAL DISTRICT AND CIRCUIT COURTS WILL FOR YEARS TO COME WRESTLE WITH THE EFFECT OF THE RESCISSION OF RULE 15c2-2 UPON ARBITRATION AGREEMENTS.

Until this Court resolves the conflict among the circuits, lower courts will continue to wrestle with the effect of the rescission of Rule 15c2-2 on arbitration agreements. Contrary to Respondent's conclusion, the number of cases impacted by this question is by no means "minimal." (Resp., p. 3.) As demonstrated in the first footnote of Dean Witter's Petition, 32 United States District Court decisions have already struggled to determine the effect of the rescission of Rule 15c2-2 in the 30 months between the time the Rule was rescinded and the filing of Dean Witter's petition.[2] Respondent's gratuitous conclusion that "none of the customer agreements involved

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[2] In the 3½ months since Dean Witter filed its Petition, 4 more United States District Court decisions concerning the effect of the rescission of Rule 15c2-2 have been reported. *See Leonard v. Stuart-James Company, Inc.*, No. 1:89-CV-2051-JOF (N.D. Ga. June 23, 1990) (LEXIS, Genfed library, Dist file); *Caleel v. Curry*, No. 87 C 8155 (N.D. Ill. May 2, 1990) (LEXIS, Genfed library, Dist file); *Tauber v. Prudential-Bache Securities, Inc.*, [Current] Fed. Sec. L. Rep. CCH ¶95,226 (D.C. Md. April 4, 1990); *Kelly v. Robert Ainbinder & Co.*, [1989-1990 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶94,963 (S.D.N.Y. March 8, 1990).

contained a clause in the contract between the parties incorporating any rules or regulations (such as Rule 15c2-2)" is not only unsupported (Resp., p. 6); it is based on a misreading of the Tenth Circuit's majority opinion. The issue is the effect of the rescission of Rule 15c2-2, not the impact of paragraph 2 of the Customer's Agreement.[3]

Nor do any statutes of limitations shorten the potential life of this conflict. The statutes of limitations applying to federal securities law claims run from the time of an alleged violation, which may not occur for many years. Arbitration agreements executed prior to or during the time Rule 15c2-2 was in effect will continue to govern the rights of customers and brokers with respect to such

---

[3] Respondent erroneously contends that the Tenth Circuit majority opinion is based upon the application of paragraph 2 of the Customer's Agreement. (Resp., pp. 3-4). The Tenth Circuit majority opinion declines to apply the rescission of Rule 15c2-2 retroactively because it concludes that the rule itself mandated modification of the arbitration clause, and that because of such modification, Coffey had a reasonable expectation that she could litigate federal securities law claims.

> In this situation, like the *Ballay* court, we see no reason to defeat Coffey's reasonable expectation, based on the clear, unequivocal language of the Rule 15c2-2 – mandated modification of the arbitration clause, that she could litigate federal securities law claims under the joint account. At the time Coffey commenced the instant litigation Rule 15c2-2 was in effect. The notice required by Rule 15c2-2 added a new paragraph to the parties' contract.

(App. A-12). Even if Respondent were correct that the arbitration agreement was modified by operation of paragraph 2 to incorporate the Rule 15c2-2 notice, it would have likewise been re-modified by the rescission of Rule 15c2-2.

future claims. Applicable statutes of limitations do *not* run from the date of the rescission of Rule 15c2-2. Accordingly, if the conflict over the effect of the rescission of Rule 15c2-2 is left unresolved, its longevity is unlimited and the answers to the question presented in the Petition will vary from one circuit or district to the next.

CONCLUSION

Because this Court's guidance is essential to reconciling the differing opinions of the federal circuits, some of which resurrect a mistrust of arbitration, a writ of certiorari should issue to review the judgment and decision of the Court of Appeals.

Respectfully submitted this 27th day of July, 1990.

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